

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7024

In The
United States Court of Appeals
For the Second Circuit

RICHARD VOIGHT and DICK VOIGHT BUICK, INC.,

Plaintiffs-Appellants

vs.

GENERAL MOTORS CORPORATION, MOTOR
HOLDING DIVISION, GENERAL MOTORS COR-
PORATION; BUICK MOTOR DIVISION, GENERAL
MOTORS CORPORATION; GENERAL MOTORS
ACCEPTANCE CORPORATION, ARGONAUT
DIVISION, GENERAL MOTORS CORPORATION;
MARINE MIDLAND BANK, EDWARD HIGGINS,
HARRY FORNOROLA, WILLIAM MONRIAN,

Defendants,

and

MARINE MIDLAND BANK, HARRY FORNOROLA and
WILLIAM MONRIAN,

Defendants-Appellees.

**BRIEF ON BEHALF OF
DEFENDANTS-APPELLEES**

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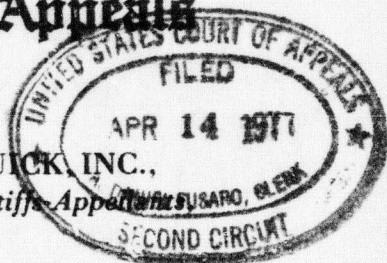


TABLE OF CONTENTS

	Page
Preliminary Statement.....	1
Issues Presented	3
Nature of the Complaint	3
POINT I — The conclusory allegations of the Complaint fail to state any claim under Sherman Act §§1 and 2; although the only relevant question is the sufficiency of the Complaint itself, neither the plaintiffs' briefs below nor in this court have indicated an ability to state any claims under these Sections; Counts X, XI and XII purporting to assert Sherman Act violations against the Marine Defendants were properly dismissed and the judgment below should be affirmed.	5
(a) <i>Count X</i>	6
(b) <i>Count XI</i>	7
(c) <i>Count XII</i>	9
(d) <i>The Conclusory Allegations of Counts X, XI and XII are Insufficient to State Any Claim Under the Sherman Act</i>	9
POINT II — No claim is stated in the Complaint, nor could one be stated against the Marine Defendants, based upon violations of Clayton Act §§3 or 7; there is apparently no authority to support the proposition that a "conspirator", not subject to the Act, who merely paves the way for an accomplice to violate these sections can be liable under the Clayton Act; Counts XI and XII insofar as they purported to allege Clayton Act violations against the Marine Defendants were properly dismissed.	18

	Page
POINT III — Count XVI was properly dismissed; on all the facts alleged, neither the stock in Dick Voight Buick, Inc., nor the General Motors' franchise is or could be a security under the Federal Securities Act...	21
POINT IV — The allegations of Count XV that the defendants "conspired to violate . . . Federal laws enumerated herein, as well as other laws," do not state any independent Federal claim, and Count XV was properly dismissed.	37
POINT V — The District Court properly dismissed the Plaintiffs' Complaint; Plaintiffs made no request of the Court to amend their Complaint prior or subsequent to Dismissal; the inclusion of the words "with prejudice" did not prevent Plaintiffs from moving to Amend; Plaintiffs' failure to seek leave to Amend should preclude consideration of their present request.	39
CONCLUSION.	43

Table of Cases

	Page
<i>Ace Beer Distributors v. Kohn, Inc.</i> , 318 F2d 283 (6th Cir. 1963) cert. den. 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 166 (1963)	13, 16
<i>Ace Van Lines & Movers, Inc. v. Republic Van & Storage Co.</i> , 369 F.Supp. 61 (D.E.D. Wisc. 1973) ...	3
<i>Adams v. American Bar Association</i> , 400 F.Supp. 219 (D.E.D. Penn. 1975)	12
<i>Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck</i> , 463 F2d 620 (2d Cir. 1972), cert. den. 93 S.Ct. 1393, 410 U.S. 944, 35 L.Ed. 2d 611	10
<i>Albert Pick-Barth Co. v. Mitchell Woodbury Corp.</i> , 57 F2d 96 (1st Cir. 1932), cert. den. 286 U.S. 552, 52 S.Ct. 503, 76 L.Ed. 1288 (1932)	17
<i>Anderson v. Home Style Stores, Inc.</i> , 381 F.Supp. 402 (D.E.D. Penn. 1974)	19
<i>Asher v. Harrington</i> , 461 F2d 890 (7th Cir. 1972)	3
<i>Atlantic Heel Co. v. Allied Heel Co.</i> , 284 F2d 879 (1st Cir. 1960)	17
<i>Avins v. Magnum</i> , 450 F2d 932 (2d Cir. 1971)	10
<i>Bichel Optical Laboratories v. Marquette National Bank of Minneapolis</i> , 336 F.Supp. 1368 (D. Minn. 1971) ..	19
<i>Bitter et al v. Hoby's International, Inc.</i> , 498 F2d 183 (9th Cir. 1974)	33, 34
<i>Black & Yates v. Mahogany Association</i> , 129 F2d 227 (3d Cir. 1941) cert. den., 317 U.S. 672, 663 S.Ct. 76, 87 L.Ed.2d 539 (1942)	12

<i>Blue Chips Stamp v. Manor Drugs</i> , 421 U.S. 723 44 L.Ed.2d 539, 95 S.Ct. 1917 (1975)	25, 36
<i>C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc.</i> , 368 F.Supp. 501 (E.D. Pa. 1973)	17
<i>Chapman v. Rudd Paint & Varnish Company</i> , 409 F2d 635 (9th Cir. 1969)	29
<i>Coniglio v. Highwood Services, Inc.</i> , 495 F2d 1286 (2d Cir. 1974)	15
<i>Conley v. Gibson</i> , 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957)	9
<i>Craig v. Sun Oil Company of Pennsylvania</i> , 515 F2d 221 (10th Cir. 1975) cert. den. —U.S.—, —S.Ct.— —, —L.Ed.2d— (1977)	15, 16
<i>Ernst & Ernst v. Hockfelder</i> , 425 U.S. 185, 96 S.Ct. 1375, 47, L.Ed. 2d 668 (1976)	36
<i>Fedderson Motors, Inc. v. Ward</i> , 180 F2d 519 (10th Cir. 1950)	16, 40, 41
<i>Fine v. City of New York</i> , 529 F2d 70 (2d Cir. 1975) . . .	10
<i>Forman v. Community Services Inc.</i> , 500 F2d 1246 (2d Cir. 1974)	26
<i>Forman v. Davis</i> , 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)	40
<i>GAF Corporation v. Circle Floor Co., Inc.</i> , 463 F2d 752 (2d Cir. 1972)	14
<i>George R. Witten Jr., Inc. v. Paddock Pool Builders, Inc.</i> , 508 F2d 547 (1st Cir. 1974), cert. den. 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 631 (1975)	17
<i>Golden v. Kentile Floors, Inc.</i> , 475 F2d 288 (5th Cir. 1973)	15

	Page
<i>Goldman v. Summerfield</i> , 214 F2d 858 (D.C. Cir. 1954)	13
<i>Grenader v. Spitz</i> , 537 F2d 612 (2nd Cir. 1976)	22
<i>Gulf Oil Corporation v. Copp Paving Company</i> , 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974)	20
<i>Hall v. Tower Land & Investment Co.</i> , 512 F2d 481 (5th Cir. 1975).	40
<i>Heart Disease Research Foundation v. General Motors Corp.</i> , 463 F2d 98 (2d Cir. 1972)	10
<i>Hohensee v. Akron Beacon Journal Publishing Co.</i> , 277 F2d 359 (6th Cir. 1960) cert. den. 364 U.S. 914, 81 S.Ct. 277, 5 L.Ed.2d 277 (1961)	10
<i>Joe Westbrook, Inc. v. Chrysler Corp.</i> , 419 F.Supp. 824 (N.D.G.A. 1976)	38
<i>Klebanow v. New York Produce Exchange</i> , 344 F2d 294 (2d Cir. 1965).	11
<i>Levering & Garrigues v. Morrin</i> , 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933)	3
<i>Lilly v. United States Lines Co.</i> , 42 F.Supp. 214 (S.D.N.Y. 1941)	41
<i>Mr. Steak Inc. v. River City Steak, Inc.</i> , 460 F2d 666 (10th Cir. 1972)	29, 35
<i>Murphy v. Kodz</i> , 351 F2d 163 (9th Cir. 1965)	41
<i>Nagler v. Admiral Corporation</i> , 248 F2d 319 (2d Cir. 1957)	9
<i>Peerless Dental Supply Co. v. Weber Dental Mfg. Co.</i> , 299 F.Supp. 331 (E.D. Pa. 1969)	17
<i>Perryton Wholesale Inc. v. Pioneer Distributing Co.</i> , 353 F2d 618 (10th Cir. 1965)	17

	Page
<i>Piper v. Chris-Craft Industries, Inc.</i> , 45 USLW 4182 (1977).....	36
<i>Poller v. Columbia Broadcasting Systems, Inc.</i> , 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).....	9
<i>Ryan v. J. Walter Thompson Co.</i> , 453 F2d 444 (2d Cir. 1971).....	36
<i>Sansom Committee v. Lynn</i> , 366 F.Supp. 1271 (D.E.D. Penn 1973).....	13
<i>Santa Fe Industries, Inc. v. Green, et al</i> , —USLW— — (1977).....	36
<i>Sardo v. McGrath</i> , 196 F2d 20 (D.C. Cir. 1952).....	13
<i>Schuler, Jr. v. Better Equipment Launder Center, Inc.</i> , <i>et al</i> , (D.C. Dist of Mass. 1973), CCH Fed. Sec. Law Rept. 1973 Transfer Binder §94,074 at p. 94,324	29
<i>SEC v. Glenn W. Turner Enterprises, Inc.</i> , 474 F2d 476 (9th Cir. 1973)	31, 32, 34, 35
<i>SEC v. W.T. Howey Co.</i> , 328 U.S. 293, 90 L.Ed. 1244, 66, S.Ct. 1100, 163 ALR 1043 (1946)	28
<i>Shotkin v. General Electric Co.</i> , 171 F2d 236 (10th Cir. 1948)	16
<i>Silver Hills Country Club v. Sobieski</i> , 55 Cal.2d 811, 361 P.2d 906 (1961)	30
<i>Swan v. Board of Higher Education of the City of New York</i> , 319 F2d 56 (2d Cir. 1963)	40
<i>United Grocers Company v. Sau-Sea Foods</i> , 150 F.Supp. 267 (S.D.N.Y. 1957).....	12
<i>United Housing Foundation v. Forman</i> , 421 U.S. 837, 44 L.Ed.2d 621, 95 S.Ct. 2051 (1975)	10, 23, 24, 26, 28, 29, 36

	Page
<i>United Mine Workers v. Gibbs</i> , 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 218 (1966)	3
<i>United States v. American Maintenance Industries</i> , 422 U.S. 271, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975)	20
<i>United States v. General Motors Corp.</i> , 121 F.2d 376 (7th Cir. 1941).....	19
<i>United States v. Investors Diversified Services, Inc.</i> , 102 F.Supp. 645 (D. Minn. 1951)	19
<i>Venture Investment Company Inc. v. Schaefer</i> , 3 Blue Sky L. Rept. §71,031 (D.C. Colorado 1972)	33
<i>Washburn v. Madison Square Garden Corp.</i> , 340 F.Supp. 504 (S.D.N.Y. 1971).....	41
<i>Weiner v. Bank of King of Prussia</i> , 358 F.Supp. 684 (D.E.D. Penn. 1973)	12
<i>Wendkos v. ABC Consolidated Corp.</i> , 379 F.Supp. 15 (D.E.D. Penn. 1974)	19
<i>Wieboldt v. Metz</i> , 355 F.Supp. 255 (D.S.D.N.Y. 1973) .	
.....	30, 31, 32

Statutes and Rules

Sherman Act §1 (15 USCA §1)	5
Sherman Act §2 (15 USCA §2)	5
Clayton Act §3 (15 USCA §14)	18
Clayton Act §7 (15 USCA §18)	18
Automobile Dealers Day-In-Court-Act, 15 USCA §1221 et seq	37
Federal Rule 41(b)	40
Federal Rule 15(a)	40
Securities Act of 1933, 15 USCA §779	22, 23
Securities Act of 1933, 15 USCA §77m	22
Securities & Exchange Act of 1934, Rule 10B-5, 240 CFR 10b-5	22, 23

Others

2A Moores Federal Practice §12.08	10
2A Moores Federal Practice §8.17(5)	12

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MARINE MIDLAND BANK, EDWARD HIGGINS,
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Defendants,

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WILLIAM MONRIAN,
Defendants-Appellees.

**BRIEF ON BEHALF OF
DEFENDANTS-APPELLEES**

Preliminary Statement

Plaintiffs, Richard Voight and Dick Voight Buick, Inc.,
appeal from an Order and Judgment of the District Court
dismissing their Complaint solely as against the Defendants,
Marine Midland Bank, William Monrian and Harry Fornorola

(the "Marine Defendants"). The remaining defendants (the "General Motors Defendants") did not move to dismiss and are not parties to the present Appeal.

In the Court below, the Marine Defendants moved to dismiss the Complaint on the three-fold grounds that (1) it failed to state any claim upon which relief could be granted (Rule 12b (6)) (2) it therefore failed to confer subject matter jurisdiction in the District Court (Rule 12b(1)) and (3) it violated the requirement of Rule 8(a) (2) that a Complaint "contain a short and plain statement of the claim showing that the pleader is entitled to relief" (A. 76-77).¹ In reply to the Motion to Dismiss, an Affidavit was submitted by one of plaintiff's attorneys, asserting his arguments for denial of the defendants' motion (A. 83-87).

The motion was submitted for determination on the written Memoranda of both parties (A. 95). No request was made by the plaintiffs, either in their Answering Affidavit or in their Memorandum² for leave to amend their Complaint should the Court grant the Motion to Dismiss.

After the District Court had rendered its Decision and Order dismissing the Complaint, it issued a Certificate pursuant to Rule 54(b), allowing appeal to this Court (A. 98-99). Shortly thereafter, the plaintiffs filed their Notice of Appeal.

No motion was made by the plaintiffs in the District Court to vacate the District Court's Judgment and permit plaintiffs to amend their Complaint pursuant to Rule 59(e) or 60(b).

In this Court, the Marine Defendants moved to dismiss the Appeal on the ground that the District Court had improvidently granted the 54(b) Certificate. By Order dated March 1, 1977, the motion by the Marine Defendants was denied.

¹References to the Appendix.

²The Memorandum submitted by the Plaintiffs in the District Court has been made an Exhibit to Appellees' Brief herein.

Issues Presented

Whether the Plaintiffs' Complaint states any Federal claim against the Marine Midland Defendants.

Whether in light of existing allegations the Plaintiffs can state any Federal claim against the Marine Midland Defendants.

Whether Plaintiffs are estopped from seeking leave to amend having made no request for such relief in the Court below.

Nature of the Complaint

The plaintiffs have served a rambling and prolix 52-page, 151-paragraph, 18-count Complaint variously attempting to allege claims against the defendants, General Motors Corporation, some of its divisions, and Edward Higgins, an employee, together with Marine Midland Bank, and two of its employees, William Monrian and Harry Fornorola (A. 1-51). Plaintiffs seek a total of \$85,000,000 in damages: \$25,000,000 in "compensatory" damages to be trebled and \$10,000,000 "punitive" damages (A. 50).

Jurisdiction of the Federal Court is claimed under the Sherman Antitrust Act, Clayton Antitrust Act, the Securities Act of 1933, the Securities and Exchange Act of 1934, and in the case of General Motors only, the Automobile Dealer Day In Court Act (A. 1, 32). A vast majority of the counts in the Complaint are addressed solely to state-related common law and statutory claims for which the plaintiffs claim the Court has pendent jurisdiction.³ Diversity jurisdiction is not claimed.

³In the District Court, the Marine Defendants requested the Court to consider first the sufficiency of the Federal claims since it is well settled that pendent jurisdiction of the state-related causes of action is wholly conditioned on the sufficiency of the federal claims. In the words of the Supreme Court, "(t)he federal claim must have substance sufficient to confer subject matter jurisdiction on the court." *United Mine Workers v. Gibbs*, 383 US 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218, 227 (1966). See also *Levering & Garrigues Co. v. Morrin*, 289 US 103, 53 S. Ct. 549, 77 L. Ed. 1062 (1933); *Ace Van Lines & Movers, Inc. v. Republic Van & Storage Co.*, 369 F. Supp. 61, at 63 (D.E.D. Wisc. 1973; *Asher v. Harrington*, 461 F.2d 890, at 895 (7th Cir. 1972).

The only counts of the Complaint which purport to allege any federal claims against the Marine Defendants are:

- (1) Count X — Sherman Antitrust Act, §§1 and 2 (A. 34).
- (2) Count XI — Clayton Antitrust Act, §§3 and 7; Sherman Antitrust Act, §§1 and 2 (A. 34-35).
- (3) Count XII — Clayton Antitrust Act, §§3 and 7; Sherman Antitrust Act, §§1 and 2 (A. 36).
- (4) Count XV — Conspiracy to violate "federal laws enumerated herein." (A. 39-40).
- (5) Count XVI — Securities Act of 1933 and Securities and Exchange Act of 1934 (A. 40-45).

Emerging from the welter of confusing and conclusory allegations of the Complaint, the background facts of the case may be simply stated as in the words of the District Court (A. 94):

In 1967, the plaintiffs opened a Buick dealership in the Town of Greece, New York. The corporate plaintiff was the owner of the franchise from General Motors Corporation and of all the assets of the dealership. Richard Voight was part owner of the stock of Dick Voight Buick, Inc. The Complaint alleges that during most of the time between 1967 and 1975, the dealership successfully operated the franchise and made profits. The Complaint alleges that at some point, apparently in 1975, General Motors Corporation terminated the franchise and plaintiff Richard Voight sold the stock in Dick Voight Buick, Inc., to General Motors Corporation. The Complaint alleges that both plaintiffs entered into credit and other banking transactions with the defendant Marine Midland Bank for dealership purposes and for the personal use of the plaintiff, Richard Voight.

Apart from the background facts, it is all but impossible to piece together the allegations of the Complaint to form a coherent thread of operative facts which are supposed to form the federal question basis for the defendants' liability. As

analyzed more fully hereafter, the document is more notable for what it does not allege, than for what can be gleaned from its four corners.

POINT I

The conclusory allegations of the Complaint fail to state any claim under Sherman Act §§1 and 2; although the only relevant question is the sufficiency of the Complaint itself, neither the plaintiffs' briefs below nor in this court have indicated an ability to state any claims under these Sections; Counts X, XI and XII purporting to assert Sherman Act violations against the Marine Defendants were properly dismissed and the judgment below should be affirmed.

The Complaint's allegations against the Marine Defendants charging violations of Sherman Act §1⁴ and §2⁵ are addressed in Counts X, XI and XII of the Complaint. An examination of the allegations in each Count as well as the Complaint as a whole, indicates that no claim has been stated under either Section. Nothing more has been attempted than a conclusory recitation of violations of the Statute by the Marine Defendants using paraphrases of the statutory language.

⁴Section 1 of the Sherman Act provides in part (15 U.S.C.A. §1):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

⁵Section 2 of the Sherman Act (15 U.S.C.A. §2) provides in part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

(a) *Count X*

The central allegations of the claimed violations of §1 and §2 in Count X are found in ¶80 which states as follows:

80. That as a result of the illegal conduct alleged and/or the several combinations and conspiracies to commit the various illegal acts, the defendants named herein have acted in concert and conspired with each other and others not named herein, to carry out the foregoing combinations and conspiracies in violation of the provisions of 15 U.S.C. §1, Sherman Antitrust Act, and in furtherance of a conspiracy to monopolize and in monopolization of interstate trade and commerce in the United States, including the State of New York, §340 of the General Business Law of the State of New York, in violation of 15 U.S.C. §2, Sherman Antitrust Act, as well as in violation of the antitrust laws of the State of New York, §340 of the General Business Law of the State of New York.

The fundamental and critical questions which are wholly unanswered by the conclusory allegations of ¶80 of the Complaint are *what* several combinations and conspiracies, between *whom*, for *what purpose* and with *what result*? The Complaint will be searched in vain for any answer. No simple combinations are alleged, much less are "conspiracies." There is no hint in the Complaint of any joint action between the General Motors Defendants and the Marine Defendants nor commitment to any common and specific goal.⁶ In fact, in ¶54 L, the plaintiffs

⁶Plaintiffs' Brief on appeal relies almost entirely on Paragraph 40 of the Complaint for its contention that any conspiratorial activity was alleged between the Marine and General Motors Defendants.

Paragraph 40 alleges in part as follows:

40. That the aforementioned promises, representations and warranties made by Defendant MARINE MIDLAND BANK, MONRIAN, FORNOROLA, and other agents, officers, employees and representatives of Defendant MARINE MIDLAND BANK, in

Footnote continued on next page

complain that the General Motors Defendants refused to "communicate with, contact and/or even talk to defendant Marine Midland Bank . . . in or about October, 1973, and thereafter." (A. 27)

(b) *Count XI*

The pivotal allegations of the claimed Sherman Act violations by the Marine Defendants in Count XI come in the following Paragraphs:

84. That in addition to the foregoing illegal, wrongful and unlawful conduct on the parts of the defendants named in this Count XI, the defendant MARINE MIDLAND BANK, through its officers, agents, employees and representatives on more than one occasion, insisted upon plaintiffs' dealing with defendant MARINE MIDLAND BANK exclusively as to wholesale and retail financing of automobiles, parts, and accessories, and on more than one occasion, threatened plaintiffs expressly and/or implied by words or conduct, that defendant MARINE MIDLAND BANK would cancel all finance lines of plaintiffs if defendant MARINE MIDLAND BANK did not receive all of plaintiffs' retail paper.

Footnote continued from preceding page

which Defendant GENERAL MOTORS consented and/or acquiesced, were made with the complete knowledge, consent and approval of all Defendants named herein, and said promises, representations and warranties were false and fraudulent in that said Defendants never intended that they would be carried out or fulfilled, but rather in truth, said Defendants always intended to and did, in fact, act only for their own benefit and profit, all as indicated by numerous acts and/or failures to act, some of which are as follows:

It can hardly be claimed that this single paragraph which speaks merely of "consent and acquiescence", "knowledge . . . and approval" alleges "joint action" or commitment to any common goal.

86. That as a result of all the foregoing, competition in the market as defined herein has been substantially lessened and/or foreclosed and there is a dangerous probability of monopolization of such market in violation of §3 and §7 of the Clayton Antitrust Act, §1 and §2 of the Sherman Antitrust Act, as well as the antitrust laws of the State of New York, §340 of the General Business Law of the State of New York.

The conclusions of ¶86 are wholly unsupported by ¶84 or any other allegations of the Complaint.⁷

Even if the Court must accept as true the allegations of ¶84 concerning the claimed "threats" of the Marine Defendants, plaintiffs do not advise that they took any action or forbore from taking any action as a result of such threats; nor that such threats led to any result at all.⁸

Equally unenlightening and typical of the ambiguous and conclusory statements of the Complaint is the statement of ¶86 that "competition in the market as defined herein has been substantially lessened and/or foreclosed." Significantly, the Complaint contains no definition of the market in which competition is supposed to have been substantially lessened or foreclosed nor explains in any fashion how competition has been lessened or foreclosed.

Nor are any other elements of any cognizable violation of the Sherman Act Sections alleged in Count XI or in the balance of the Complaint.

⁷It is clear that the allegations contained in ¶85 were not intended to nor do they have any reference specifically to the Marine Defendants.

⁸In fact, plaintiffs had an additional source of wholesale and retail financing from Manufacturers Hanover (See Complaint ¶40J, A22)

(c) *Count XII*

Most conclusory of all the allegations found in the Complaint are those of Count XII. Paragraph 89 contains the core allegation of the plaintiffs' purported claim:

89. That the defendants herein, and their agents, officers, employees and representatives, conspired together and maliciously and willfully entered into a scheme to defraud and deceive plaintiffs, to interfere with plaintiffs' business, to deprive plaintiffs of their investments and plaintiffs' business expectancies and property, and said defendants further conspired to engage in unfair competition and to violate the Sherman Antitrust Act, §1 and §2, the Clayton Antitrust Act, §3 and §7, as well as the antitrust laws of the State of New York, §340 of the General Business Law of the State of New York.

It is clear that the phrase "conspired to engage in unfair competition and to violate the Sherman Antitrust Act, §1 and §2" is the crux of plaintiffs' assertion that the Sherman Act has been violated. On this bare unsupported statement is supposed to rest the foundation of plaintiffs' claim.

Apart from the fact, as noted before, that no joint action, much less a conspiracy has been alleged, the Complaint is otherwise devoid of any factual averments supporting the claims of Sherman Act violation.

- (d) *The Conclusory Allegations of Counts X, XI and XII are Insufficient to State Any Claim Under the Sherman Act.*

The Rules governing dismissal motions are well settled; the liberality with which pleadings are viewed by the Federal Courts is not essentially different in antitrust actions from other actions. The Plaintiffs' citations to *Conley v. Gibson*, 355 US 41, 78 S. Ct. 99, 2 L. Ed2d 80 (1957) and *Poller v. Columbia Broadcasting Systems, Inc.*, 368 US 464, 82 S. Ct. 486, 7 L. Ed2d 458 (1962) and *Nagler v. Admiral Corporation*, 248 F2d 319 (2d Cir. 1957) are appropriate to state the general criteria,

but do not salvage the present Complaint from its deficiencies, however liberal the Rules.

Although "(f)or purposes of the motion, the well-pleaded material allegations of the Complaint are taken as admitted; . . . conclusions of law or unwarranted deductions of fact are not admitted". 2A Moores Federal Practice ¶12.08. And conclusory allegations of violation of a statute or of violation of rights without supporting allegations of fact will not sustain a complaint even under the liberal Federal Rules approach. *United Housing Foundation, Inc. v. Forman*, 421 US 837, 859, 44 L. Ed2d 621, 636, 95 S. Ct. 2051, 2064 (1975) (vague and conclusory allegations under Civil Rights Act are required to be dismissed); *Avins v. Magnum*, 450 F2d 932 (2d Cir. 1971) (conclusory allegations of politically motivated discrimination are insufficient as a matter of law); *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F2d 620 (2d Cir. 1972), cert. den. 93 S. Ct. 1393 (conclusory allegations of violation of Civil Rights Statute merit dismissal without leave to amend); *Fine v. City of New York*, 529 F2d 70 (2d Cir. 1975) (conclusory allegations of deprivation of civil rights insufficient as matter of law); *Hohensee v. Akron Beacon Journal Publishing Co.*, 277 F2d 359 (6th Cir. 1960); cert. den. 364 US 914, 81 S. Ct. 277, 5 L. Ed2d 227 (1961) (vague conclusions in antitrust complaint insufficient as a matter of law).

The factually unsupported claims of conspiracy in the present Complaint couched in the statutory rubric are mere conclusions of the pleader, are not admitted by the movants and fall within this Court's holding concerning Sherman Act §§ 1 and 2 claims and *Heart Disease Research Foundation v. General Motors Corp.*, 463 F2d 98, 100 (2d Cir. 1972):

Even under the liberal Federal Rules of Civil Procedure, there is a limit to how much a court may be called upon to divine in assessing the sufficiency of the complaint

before it, particularly when the plaintiff is represented by counsel.

As to Count I, it was well within the district court's discretion to dismiss the claim since no facts are alleged supporting an antitrust conspiracy. Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal. See generally, 2A Moore, *Federal Practice*, ¶12.08 (2d ed. 1968). . . . We hold only that the amended complaint before us was so insufficiently and frivolously drawn that Judge Tyler could properly dismiss the action without granting plaintiffs further opportunity to amend.

and within this Court's language concerning Sherman Act claims in *Klebanow v. New York Produce Exchange*, 344 F2d 294, 299 (2d Cir. 1965):

The district judge did not reach appellees' alternative point that the complaint did not set forth 'a short and plain statement of the claim showing that the pleader is entitled to relief', required by F.R. Civ. P. 8. As to this, we agree with appellees. The statement which we have quoted in full, although assuredly "short," is anything but "plain" — it furnishes not the slightest clue as to what conduct by the defendants is claimed to constitute "an illegal contract, combination and conspiracy." While *Nagler v. Admiral Corp.*, 248 F2d 319, 322-323 (2d Cir. 1957), repudiated the idea that "some special pleading . . . is required in antitrust cases," it is no authority that in such cases the pleader is specially privileged to plead nothing but the statutory words. A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently.

To the same effect concerning Sherman Act complaints: *Black & Yates v. Mahogany Association*, 129 F2d 227, 231-232 (3d Cir. 1941) cert. den., 317 US 672, 663 S. Ct. 76, 87 L. Ed. 539 (1942) ("A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment".); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 701-702 (D.E.D. Penn. 1973) (unsupported allegation of combination and conspiracy insufficient as a matter of law); *Adams v. American Bar Association*, 400 F. Supp. 219, 223 (D.E.D. Penn. 1975) ("Although the Court is aware of difficulties faced by plaintiff trying to prove existence of conspiracy, barebone statement is insufficient. Federal Courts require plaintiff to specify with at least some particularity the overt action which defendants are alleged to have been engaged."); *United Grocers Company v. Sau-Sea Foods*, 150 F. Supp. 267 (An allegation of "conspiracy to create an unreasonable restraint of trade" is the most naked of conclusions and is insufficient); see also 2A *Moore's, Federal Practice* ¶8.17(5).

On this appeal, the thrust of Plaintiffs' Brief is to recognize the deficiencies in the conspiracy allegations of the Complaint by essentially alleging new facts. As they state in their Brief (P. 18):

To some extent, plaintiffs have in this brief set forth facts in addition to those contained in their complaint in order to support the position that plaintiffs have proper claims under the Sherman Act.

The new facts which the Plaintiffs allege in their Brief are summarized at Page 14 as follows:

Liability of the Marine Midland Defendants under the Sherman Act is based upon their status as conspirators with the General Motors Defendants rather than as

competitors with plaintiffs. The General Motors Defendants controlled plaintiffs with the aid of their co-conspirators, the Marine Midland Defendants. Because of the conspiracy between the Marine Midland Defendants and the General Motors Defendants (which originally had as its purpose the use of plaintiffs as a market primer and subsequently had as its purpose the destruction of plaintiffs' business), the Marine Midland Defendants have violated §1 of the Sherman Antitrust Act and plaintiffs have properly stated a claim against the Marine Midland Defendants for such violation in their Complaint.

Liability under §2 is now claimed on the same new allegations, namely, the claimed conspiracy to establish and destroy the Dick Voight dealership in an effort to further General Motors' attempts "to monopolize trade in commerce". (Plaintiffs' Brief, P. 16)

While only the allegations of fact in the Complaint, and not new allegations in Plaintiffs' Memoranda or Briefs, were relevant below and are relevant here,⁹ the new allegations do not improve the Plaintiffs' Complaint. What the Plaintiffs seem to claim on the part of the Marine Defendants is a naked, mindless, profitless and gratuitous effort to help the Defendant General Motors in the apparently pointless destruction of a dealership in which General Motors had an ownership interest. It is true that the Plaintiffs generally allege in their Brief (although not in their Complaint) that "General Motors operates wholly factory-owned outlets for the retail sale of Buick automobiles and as such was a competitor of Plaintiffs (Plaintiffs' Brief, PP. 14-15). However, we are not told where these wholly-owned franchises operate. Specifically, no claim is

⁹*Ace Beer Distributors v. Kohn, Inc.*, 318 F2d 283, 284-285 (6th Cir. 1963), cert. den. 375 US 922, 84 S. Ct. 267, 11 L. Ed2d 166 (1963); *Sansom Committee v. Lynn*, 366 F. Supp. 1271, 1278 (D.E.D. Penn. 1973); *Goldman v. Summerfield*, 214 F2d 858, 859 (D.C. Cir. 1954); *Sardo v. McGrath*, 196 F2d 20, 23 (D.C. Cir. 1952).

made nor indeed can be that a General Motors wholly-owned franchise was in direct competition with the Plaintiffs in the sale of Buick automobiles within the effective realm of Plaintiffs' operations. Nor is claim made that a General Motors wholly-owned Buick franchise took over Plaintiffs' franchise at Plaintiffs' location. Nor is it claimed that after Plaintiffs' franchise was terminated, there were fewer Buick dealers in the geographic area of Plaintiffs' influence.¹⁰

The absence of allegations which would indicate some meaningful anticompetitive motives on behalf of the Defendants and some conceivable adverse impact on competition, renders the Plaintiffs' claim that the Defendants conspired to drive them out of business beyond the bounds of the antitrust laws, even if not otherwise alleged in such conclusory terms.

As this Court stated in *GAF Corporation v. Circle Floor Co., Inc.*, 463 F2d 752 at 757 (2d Cir. 1972):

The Supreme Court has consistently reiterated that "(t)he Sherman Act was . . . aimed at preserving free and unfettered *competition* as the rule of trade" and that

¹⁰It should be added parenthetically and with due apologies to the Court for exceeding the record that these claims cannot be made by the Plaintiffs because they would be untrue. The Schriebers, mentioned at paragraphs 40 (I), (K) & (O) of the Complaint and who are not Defendants in this case, ultimately obtained a franchise to operate a Buick dealership from General Motors upon termination of the Plaintiffs' franchise and several months before the commencement of this action. Also prior to commencement of suit, the Schriebers obtained a lease from the Plaintiffs to operate their Buick dealership on the exact location where the Plaintiffs' dealership had operated. Prior to the termination of Plaintiffs' franchise, the Schriebers were not in competition with the Plaintiffs, did not operate a Buick dealership, but in fact were operators of a Toyota dealership in the Buffalo, New York, area. The Schriebers' existing Buick dealership and franchise is not owned in whole or in part by the General Motors Defendants and the Marine Defendants do not provide financing to the Schriebers' Buick dealership.

"the policy unequivocally laid down by the Act is competition." (Citation omitted) The courts in interpreting §4 of the Clayton Act and its predecessor, have endeavored, although with some inconsistency and conflict, to promote the policy of competition established by the Sherman and Clayton Acts by interpreting §4 as allowing treble damages only to those who have suffered some diminution of their ability to compete.

* * *

This Court has emphasized, that, to recover, the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he is or was engaged.

Similarly, in *Coniglio v. Highwood Services, Inc.*, 495 F2d 1286 at 1293 (2d Cir. 1974), this Court definitively rejected the plaintiff's argument that "a deleterious effect on competition is not essential to prove a violation of §1 of the Sherman Act" and held that his failure to demonstrate any adverse competitive affect provided a proper basis to grant summary judgment against him. Further as stated in *Golden v. Kentile Floors, Inc.*, 475 F2d 288 at 290 (5th Cir. 1973):

Supreme Court precedents make clear that participation in a combination is illegal only when, at the minimum, it manifestly results from the family of procompetitive or anticompetitive objectives related to the relevant market.

In this same connection and in connection with the Plaintiffs' attempts to posture themselves in this Court for leave to appeal, they face *Craig v. Sun Oil Company of Pennsylvania*, 515 F2d 221 (10th Cir. 1975), cert. den. — US —, — S. Ct. —, — L. Ed2d — (1977).

In *Craig*, the defendant Clairborne held a franchise from the defendant, Sun Oil Company, to sell wholesale and retail tires, batteries and accessories from a filling station. Plaintiff purchased the Clairborne station and obtained a franchise and financing from Sun Oil. After the sale, the defendant Clairborne

began a wholesale tire distributorship in the same city, franchised by Sun Oil and financed for the most part by Sun Oil.

When plaintiff's business failed, he instituted suit and claimed "that Clairborne and Sun Oil had conspired to set him up as an additional distributorship for the purpose of making it practical for Sun to finance Clairborne in a new outlet, and once that purpose was achieved, Clairborne and Sun continued to conspire to destroy his business" *Id.* at 223.

The Court held that the plaintiff's claim of conspiracy and the fraudulent representations which allegedly induced the plaintiff to enter the market were at best actionable as a business tort. *Id.* at 223. It further held that as to the destruction of plaintiff's business, the "in" and "out" of the plaintiff had no impact on the competitive situation and was not actionable under the antitrust theory of plaintiff's case."¹¹ *Id.* at 224.

The *Craig* case highlights the necessity under the antitrust statutes to plead and prove not only anticompetitive motives, but anticompetitive effects. Mere injury to the plaintiff without more is insufficient to create a Sherman Act claim.

Neither the Complaint nor Plaintiffs' Memorandum in the District Court nor their Brief on Appeal have spelled out even a

¹¹To the same effect, *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F2d 283 (6th Cir. 1963) cert. den., 375 US 922, 84 S. Ct. 267, 11 L.Ed.2d 166 (1963) (Complaint that charged manufacturer and new distributor with conspiracy to destroy plaintiff's business and eliminate it as a distributor in interstate commerce does not without more indicate suppression of competition and does not indicate violation of Sherman Act. Substitution of one distributor for another does not lessen competition.) *Fedderson Motors, Inc. v. Ward*, 180 F2d 519 (10th Cir. 1950) and *Shotkin v. General Electric Co.*, 171 F2d 236 (10th Cir. 1948) (Conspiracy which results in substitution of one distributor for another does not violate Sherman Act.)

colorable fact pattern and theory of liability.¹² Without some showing that the Plaintiffs' Sherman Act case had substance or a future, it was appropriate for the District Court to have dismissed the case and to have left it to the Plaintiffs to move for the right to amend. The judgment below should be affirmed.

¹²In passing, some mention should be made of the cases cited at Page 15 of Plaintiffs' Brief in this Court: *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F2d 96 (1st Cir. 1932), cert. den. 286 US 552, (1932); *Atlantic Heel Co. v. Allied Heel Co.*, 284 F2d 879 (1st Cir. 1960); *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F2d 618 (10th Cir. 1965); *C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc.*, 368 F. Supp. 501 (E.D. Pa. 1973); and *Peerless Dental Supply Co. v. Weber Dental Mfg. Co.*, 299 F. Supp. 331 (E.D. Pa. 1969). Apart from the fact that upon reading these cases, the missing facts in the Plaintiffs' case discussed above make them impossible of comparison, it should be noted that *Pick-Barth* and *Atlantic Heel* have been overruled by the First Circuit Court of Appeals in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F2d 547 at 561 (1st Cir. 1974) cert. den. 421 US 1004, 95 S. Ct. 2407, 44 L.Ed.2d 631 (1975). In addition, both the *Perryton* and *Sauter* cases, insofar as they relied on *Pick-Barth* and *Atlantic Heel* have been questioned by the Court in *Whitten*. Further, the Tenth Circuit in *Craig, supra*, at 224, seems to have restricted its holding in *Perryton* to the specific facts of the cases and has further indicated that *Perryton* may not be viewed as a per se case.

POINT II

No claim is stated in the Complaint, nor could one be stated against the Marine Defendants, based upon violations of Clayton Act §§3 or 7; there is apparently no authority to support the proposition that a "conspirator", not subject to the Act, who merely paves the way for an accomplice to violate these sections can be liable under the Clayton Act; Counts XI and XII insofar as they purported to allege Clayton Act violations against the Marine Defendants were properly dismissed.

The purported violations of Clayton Act §§ 3¹³ and 7¹⁴ are contained in Counts XI and XII of the Complaint. The central allegations of these Counts are contained in Paragraphs 86 and 89, of the complaint quoted in full above at pages 8 and 9.

¹³Section 3 of the Clayton Act (15 U.S.C.A., §14) states in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of *goods, wares, merchandise, machinery, supplies or other commodities*, . . . where the effect of such lease, sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (Emphasis added)

¹⁴Clayton Act §7 provides in pertinent part (15 U.S.C.A., §18):

§18. *Acquisition by one corporation of stock of another*

No corporation engaged in commerce shall *acquire*, directly or indirectly, the whole or any part of the *stock or other share capital* and no corporation subject to the jurisdiction of the Federal Trade Commission shall *acquire* the whole or any part of the *assets* of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall *acquire*, directly or indirectly, the whole or any part of the *stock or other share capital* and no corporation subject to the jurisdiction

The allegations of these Paragraphs are as conclusory and circular in attempting to allege Clayton Act claims against the defendants as they are an attempt to allege the Security Act claims. Moreover, as with the Security Act claims, no factual support may be found in the balance of the Complaint to bolster the Clayton Act violations.

The Plaintiffs do not contend in this Court that the Marine Defendants violated §3 or §7 in their own right.¹⁵ (Plaintiffs' Brief, PP. 29-30) Indeed the sole relationship which the Bank and its employees is alleged to have had with the Plaintiffs is that of lender or banker,¹⁶ and it has never been contended by the Plaintiffs that the Marine Defendants acquired their stock or assets.

Without citation of a single authority, the Plaintiffs now contend that their theory for liability of the Marine Defendants is "conspiracy". They say that the General Motors Defendants violated §3 and §7 of the Clayton Act and that the Marine Defendants paved the way for the General Motors violations.

¹⁵In fact, in the Court below, Plaintiffs' Memorandum was entirely silent on the applicability of Clayton Act §7 to this case or to the Marine Defendants, and enigmatically cited as its sole authority for §3 liability, the Sherman Act case of *United States v. General Motors*, 121 F.2d 376 (7th Cir. 1941). (See PP.17-18, Plaintiffs' Memorandum in the District Court — Exhibit to this Brief.)

¹⁶It has been held without exception that the phrase "other commodities" strictly confines the application of §3 of the Clayton Act to the terms "goods, wares, merchandise, machinery, supplies" and as a matter of law does not include loans and other banking services. *United States v. Investors Diversified Services, Inc.*, 102 F. Supp. 645 (D. Minn. 1951); *Bichel Optical Laboratories, Inc. v. Marquette National Bank of Minneapolis*, 336 F. Supp. 1368 (D. Minn. 1971); *Wendkos v. ABC Consolidated Corp.*, 379 F. Supp. 15 (D.E.D. Penn. 1974); *Anderson v. Home Style Stores, Ind.*, 381 F. Supp. 402 (D. E.D. Penn. 1974). In the words of the court in *Wendkos v. ABC Consolidated Corporation*, *supra*, at p. 18, "the term 'commodities' for Clayton §3 purposes does not include money in the form of loans."

That the allegations of the Plaintiffs' Complaint fail to state any claim of conspiracy has already been discussed in Point I above. But even if proper allegations had been made, no authority has been found which has stretched the outer limits of the Clayton Act to accommodate facts such as those now asserted for the first time in Plaintiffs' Brief.

Under Sherman Act §§ 1 and 2, combination and conspiracy are one of the touchstones of liability specifically stated in the statute. No reference to combinations and conspiracies can be found in Clayton Act §§ 3 or 7. In fact, only the word "person" and "corporation" used in the singular may be found in §§ 3 and 7 respectively. Further,

The explicit reach of these provisions extends only to persons and activities that are themselves "in commerce," the term "commerce" being defined in §1 of the Clayton Act, insofar as relevant here, as "trade or commerce among the several states and with foreign nations 15 U.S.C. §12. (emphasis supplied)

* * *

. . . , [T]he distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only *persons or activities within the flow of interstate commerce — the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer*. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anti-competitive acquisitions and activities affect commerce. (emphasis supplied). *Gulf Oil Corporation v. Copp Paving Company*, 419 US 186, 194-195, 95 SCt 392 — - — 42 L.Ed 2d 378 (1974).

See also *United States v. American Building Maintenance Industries*, 422 US 271, 95 S. Ct. 2150, 45 L. Ed2d 177 (1975). From these cases, it is clear that in contrast to the Sherman Act, the Supreme Court has not been reaching to broaden the

jurisdiction of the Clayton Act beyond the persons and activities precisely defined in these Sections.

Accordingly, there is no credible basis for the assertion of Clayton Act liability against the Marine Defendants. Moreover, in the Court below, the Plaintiffs made virtually no effort to establish such liability. It was therefore appropriate to have dismissed the Clayton Act Count, and the District Court's judgment should be affirmed.

POINT III

Count XVI was properly dismissed; on all the facts alleged, neither the stock in Dick Voight Buick, Inc., nor the General Motors' franchise is or could be a security under the Federal Securities Act.

In Count XVI of the Complaint Plaintiff Voight claims a variety of purported violations of the federal securities laws.¹⁷

Since some of the alleged violations concern either non-violable or nonexistent sections of the Securities Act of 1933¹⁸ or

¹⁷Paragraph 123 of the Complaint alleges essentially all of the claimed violations as follows (A 43-44)

123. By reason of all of the foregoing, the defendants and their agents, officers, employees and representatives violated the Securities Act of 1933, 15 U.S.C., §§77(a), 277(aa), and particularly §§77(e), 77(l) and 77(q) thereof, as well as the Securities and Exchange Act of 1934, particularly §10(b) thereof, and Rule 10 B-5 issued thereunder (17 C.F.R. §240.10 B-5).

¹⁸Section 77(a) merely sets forth the short title of the Act, and there is no §277(aa).

concern sections of that statute which are clearly time barred¹⁹, the only sections of either the 1933 Act or the Securities Exchange Act of 1934 which remain are 15 USCA §77(q) and 240 CFR 10b-5.

Section 77(q) of the 1933 Act and Rule 10b-5 under the 1934 Act are the classic antifraud portions of the federal securities laws. Both sections are operative only when there exists a "security." While there is some variation in the definition of a "security" as set forth in the 1933 Act from that in the 1934 Act, they are generally treated as being identical. *Grenader v. Spitz*, 537 F2d 612, 616 (2nd Cir. 1976).

¹⁹Also alleged are violations of 15 U.S.C.A. §77(e) and §77(l). A violation of §77(e) is expressly enforceable through §77(l).

15 U.S.C.A. §77M provides in pertinent part:

... In no event shall any action be brought to enforce a liability created under section . . . 77(l)(1) of this title more than three years after the security was bona fide offered to the public, or under Section 77(l)(2) of this title more than three years after the sale.

The Complaint states (A. 40):

111. That as previously alleged, in or about *the latter part of 1966*, and during the *spring of 1967*, the defendants herein sought out the Plaintiff, RICHARD VOIGHT, to invest in and enter into a franchise dealership . . . (emphasis added)

112. That the defendants, General Motors, by and through their agents, officers, employees and representatives, *offered and attempted to sell* to the Plaintiff, RICHARD VOIGHT, *the franchise of* and the *stock in* the new dealership corporation, which had been formed and which was called Dick Voight Buick, Inc. (emphasis added)

113. That in or *about the spring of 1967*, the Plaintiff, RICHARD VOIGHT, *did in fact invest in and buy said franchise and stock*. (emphasis added)

The Complaint is dated April 23, 1976 (A. 52), nine years after the offer and sale of the franchise and the stock in Dick Voight Buick, Inc. as evidenced by the pleadings quoted above.

It is clear from a review of the Complaint, alone, that the claims based on §§77(e) and 77(l) are barred by the applicable Statute of Limitations.

Neither of §77q nor Rule 10b-5 is applicable in the instant case because a "security" is not involved as that term has been defined by the courts.

(i) *The Stock in Dick Voight Buick, Inc. is not a "Security" Under the Federal Security Acts.*

Plaintiffs allege that the stock of dealership corporation, Dick Voight Buick, Inc., was and is a "security" under the Acts.

While this allegation has a certain tautological and simplistic appeal, compare the Complaint's claim of jurisdiction:

114. . . . the *stock* in the new dealership corporation were and are securities, as defined by the Securities Act of 1933, and the Securities Exchange Act of 1934 . . . (A. 40).

with the Supreme Court's recent holding in the landmark case *United Housing Foundation Inc. v. Forman*, 421 US 837, 44 L. Ed.2d 621, 95 S. Ct. 2051 (1975).

We reject at the outset any suggestion that the present transaction, evidenced by the sale of shares called "stock," must be considered a security transaction simply because the statutory definition of a security includes the words "any . . . stock." *United Housing*, 47 L. Ed. 2d at 630.

In *United Housing*, shares of stock in an incorporated condominium housing project were issued. In reliance on certain maintenance rental projections and representations that the developer would absorb any increase, the plaintiffs purchased shares as a means of acquiring condominium interests in the project. The actual maintenance charges computed were substantially greater than those estimated and were not absorbed by the developer. Suit was commenced alleging fraud in connection with the sale of stock.

In the District Court, the defendants moved to dismiss the complaint for lack of federal jurisdiction. The motion was granted. The Second Circuit Court of Appeals, reversing the District Court, held that the plaintiffs had literally purchased "stock" which was among those items defined as a security under the Acts and that the condominium interests were investment contracts.

The United States Supreme Court reversed and held that the economic substance of the transaction controlled; that plaintiffs had merely used a stock company as a method of acquiring their real estate interests; and that such interests were not themselves securities (investment contracts). 421 U.S. at 859, 44 L. Ed. 2d at 636, 95 S. Ct. at).

In rejecting the simplistic literal approach, the Court specifically stated:

... [W]e adhere to the basic principle that has guided all of the Court's decisions in this area:

"[I]n searching for the meaning and scope of the word "security" in the Act[s], *form should be disregarded for substance and the emphasis should be on economic reality.*" *Tcherepnin v. Knight*, 389 U.S. 332, 336, 19 L. Ed. 2d 564, 88 S. Ct. 548 (1967). See also *Howey, supra*, 328 U.S., at 298, 90 L. Ed. 1244, 66 S. Ct. 1100, 163 ALR 1043

... Because securities transactions are economic in character Congress intended the application of these statutes to turn on *the economic realities underlying a transaction*, and not on the name appended thereto. ... *United Housing*, 44 L. Ed. 2d at 630. (emphasis added)

Thus, *United Housing* teaches that it is the "economic realities," the "substance" of the transactions alleged in the Complaint which determine whether the securities laws should apply. In the instant case the sole purpose of the corporate form was to obtain and hold the GM franchise. Plaintiff Voight

intended to and did invest in a *dealership*, not in the stock of Dick Voight Buick, Inc.

This "economic reality" is firmly established by the allegations in plaintiffs' own Complaint. In ¶23 plaintiff Voight sets forth a series of representations allegedly made to him by GM. In these allegations hear the plaintiff's own best statement of the "economic reality" of this transaction:

- 23. A. Plaintiff Richard Voight would become a very successful *Buick Dealer* in the Greece, New York *dealership* location.
- C. Plaintiff would make substantial profits at the Greece, New York *dealership* . . .
- D. . . . a *substantial return in his investment in the dealership*
- 24. That as a result of the aforesaid negotiations, promises, representations and warranties, *Plaintiff Richard Voight formed* or caused to be formed *the dealership corporation* called Dick Voight Buick, Inc. (emphasis added)²⁰ (A 8-14)

Again it should be emphasized that these are the plaintiff's own verified allegations of the economic reality of his in-

²⁰¶24 of the verified Complaint demonstrates that even if the stock in Dick Voight Buick, Inc. were deemed to be a "security" that it was the plaintiff who sold the security thereby obviating the application of Section 77q of the 1933 Act. Indeed when ¶24 is considered in the light of the "purchaser or seller requirements" of Rule 10b-5 as delineated by the Supreme Court in *Blue Chips Stamp v. Manor Drug*, 421 U.S. 723 (1976), it becomes apparent that plaintiff's *only possible claim is as a "seller"*; i.e., that G.M. defrauded him into selling stock in Dick Voight Buick, Inc. to it. There are no allegations of any type supporting such a claim. The frivolous nature of such a claim demonstrates conclusively that Plaintiff's only "investment" was in the franchise; and that he dealt with GM not to sell stock and not to obtain stock but to acquire a franchise to sell its cars. None of various alleged misrepresentations which plaintiff purportedly relied on concerned the Dick Voight stock. The emphasis was on the dealership franchise. See ¶23 of the Complaint quoted above.

vestment — “. . . his investment in the dealership.” Thus, any presumption respecting the applicability of the securities acts to this transaction because it is evidenced in part by “stock” is permanently and irretrievably rebutted by the Complaint itself.

In opposition to this argument, the Plaintiff's brief complains of Defendant's failure to distinguish “*United Housing*” citing to the Court certain traditional characteristics or attributes of stock noted in *United Housing* and which the Dick Voight stock allegedly has (Plaintiff's brief pp 20-21).²¹ First this argument ignores the fact that the Complaint itself has already alleged that plaintiff was not investing in these attributes but in the G.M. franchise (see discussion above). Second, the existence of these characteristics in the Dick Voight stock is negated both by the Complaint itself and by Plaintiff's admissions in the court below:

(1) *Dividends*: Plaintiff's brief asserts that he had the right to receive dividends from profits on his Dick Voight Buick stock. Compare this with ¶14 of the Complaint which emphatically establishes that no profits would be available for that purpose.

14. . . . That pursuant to a specific plan the Plaintiff Richard Voight was required to repurchase and retire the . . . (stock held by the GM defendants) . . . out of his bonus and profits realized from the operation of Dick Voight Buick, Inc.

²¹ Plaintiff also attempts to argue in his brief that the factual context of *United Housing* i.e. stock in a state subsidized cooperative apartment, is a basis for distinguishing the instant case and that one need go no further when one sees that the stock in the instant case does not involve a housing project. This position ignores the meaning of the Supreme Court's pointed overruling of the “literal approach” used by the Second Circuit in *Forman v. Community Services Inc.*, 500 F2d 1246 at 1252, i.e., . . . if a given instrument is a share of stock ‘on its face’ it is literally within the ambit of the statute. The question posed by the Supreme Court is not whether stock is involved but rather what does the “stock” represent. The Supreme Court's decision in *United Housing* holds that such inquiry is not only legitimate but essential to the invocation of the securities laws.

(2) *Voting Rights*: Plaintiff's brief asserts that the Plaintiff had voting rights while failing to advise the court of the structure of those rights which seemingly separate the voting rights from equity interests;

14. That from the time that Plaintiff, DICK VOIGHT BUICK, INC., was first organized, it was organized in such a manner that Plaintiff, RICHARD VOIGHT, was the owner and holder of the Common Stock, Class B and Preferred Stock, Class B, of said dealership corporation, with GENERAL MOTORS CORPORATION and/or its MOTORS HOLDING DIVISION being the owners and holders of the Common and Preferred Stock, Class A, of said dealership corporation . . .

(3) *Negotiability and Ability to Pledge*: While Plaintiff's brief asserts that the Dick Voight Buick stock was negotiable and pledgable, he admitted in the court below:

It is possible that the charter of Dick Voight Buick, Inc. prohibits the exercise of (these characteristics) . . ."
(Plaintiffs' Memorandum, in the District Court, p. 15).

even more tellingly the Memorandum states:

(. . . if such options had been exercised the Plaintiff, Richard Voight was subject to possible loss of his franchise with Defendant General Motors) (Plaintiffs' Memorandum in the District Court at p. 14). (Emphasis added).

(4) *Appreciation in Value*: As indicated above, Plaintiff has admitted in the District Court that the shares were not alienable without loss of the franchise. Appreciation is valueless if it cannot be realized or is only realizable at the expense of the asset which creates its value. It is clear that the appreciation was also tied to and restricted by the franchise.

Thus, under the Complaint the stock of Dick Voight Buick, Inc. held by the Plaintiff was not negotiable, alienable or pledgable; profits were not available for dividends; and ap-

preciation was not realizable. In short the "stock" was by agreement intentionally stripped of the ordinary characteristics of stock in order to assure that Dick Voight Buick, Inc. would be a mere vehicle. The investment was deliberately, with full understanding and agreement, limited to the franchise. Under the holding of *United Housing*, the stock of Dick Voight Buick would not be a sufficient basis for invoking the federal securities laws and there is no way in which Plaintiff can amend his Complaint to avoid that result.

(ii) The *G. M. Franchise* is not a "Security" Under the *Federal Security Acts*.

Having concluded that the stock in Dick Voight Buick, Inc., is insufficient to find a security, only consideration of the franchise remains.

In analyzing whether or not certain real estate interests in *United Housing* represented investment contracts the Supreme Court relied upon and re-endorsed its landmark decision in *SEC v. W. J. Howey Co.*, 328 U.S. 293 90 L. Ed. 1244, 66 S. Ct. 1100, 163 ALR 1043 (1946).

The Court in *United Housing* held (421 U.S. at 852, 44 L. Ed2d at 632, 95 S. Ct. at):

... the basic test for distinguishing the transaction from other commercial dealings is

'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.' *Howey supra*, 328 U.S., at 301, 90 L. Ed 1244, 66 S. Ct. 1100, 163 ALR 1043

This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.

The *Howey* test quoted above has received three lines of interpretation when applied to franchises. The application of any of the interpretations to the instant case will demonstrate that the subject franchise is *not* and *cannot* be a security.

"The Strict Howey Test"

This interpretation of *Howey*, an interpretation of the majority of courts, emphasizes the word "solely."

... (P)rofits to come *solely* from the efforts of others. *Id.*

Under this test the franchisee must be a wholly passive investor. *Chapman v. Rudd Paint and Varnish Company*, 409 F. 2d 635, 640 (9th Cir., 1969). *Mr. Steak Inc. v. River City Steak, Inc.*, 460 F.2d 666, 670-71 (10th Cir., 1972).

That test has been strictly adhered to by the majority of courts. *Schuler, Jr. v. Better Equipment Launder Center, Inc. et al* (D.C. Dist. of Mass., 1973), CCH Fed. Sec. Law Rept. 1973 Transfer Binder ¶94,074 at p. 94,324.

The application of this strict test to the facts of the instant case as set forth on the face of the complaint indicates that the subject Franchise was not a "security" under the Acts.

Paragraph 5 of the Complaint alleges as follows:

5. That during most of the period of time herein mentioned Plaintiff, *Richard Voight* ran, operated and managed *Dick Voight Buick, Inc.*, successfully generated profits and was recognized by Defendant, General Motors Corporation and its Buick Motor Division, and others, for *his achievements* and success (emphasis added). (A. 5-6)

Plaintiff Voight certainly has not described himself as a passive investor relying on the "entrepreneurial and managerial efforts of others." *United Housing, supra* p. 23. It is clear on the face

of the verified complaint that the strict *Howey* test is not met. And the facts cannot be so fluid that by the mere expedient of amendment the Plaintiffs can now plead the existence of a franchise which meets this test.

"The Risk Capital Test"

Silver Hills Country Club v. Sobieski, 55 Cal. 2d, 811, 361, P.2d 906 (1961) developed a variation on *Howey* which is described by Judge Lasker of the Southern District of New York as holding that:

... a franchise is a security if the franchisee's monetary contribution to the enterprise constitutes part of its initial capitalization, while his personal participation in its activities does not give him any effective control over it. The theory behind the test is that, under those circumstances, the profit-making potential of his investment is essentially realized by the franchisor and the *Howey* test that "profits [are] to come solely from the efforts of others" (328 U.S. at 301) is satisfied. *Wieboldt v. Metz*, 355 F. Supp. 255 (D.S.D.N.Y., 1973)

As Judge Lasker points out, the Risk Capital Test only applies if (a) the franchisee participates only nominally in exchange for profits or (b) the franchisee participates actively but the franchisor uses the franchise fees to meet "a substantial portion" of its initial capital needs in supplying goods and services to the franchisee. *Id.* at p. 259.

As indicated above in Paragraph 5 of the complaint, plaintiff Voight has described himself as an active participant who "ran, operated and managed Dick Voight Buick, [and] successfully generated profits." In short, plaintiff was, by his own pleadings, active in the franchise.

Therefore, the Risk Capital Test could apply only if the defendant General Motors required the plaintiff's franchise fee as a "substantial portion" of its own capital needs. Certainly the

plaintiff does not, and could not, under any conceivable set of circumstances, allege that his franchise fees were "a substantial portion" of General Motor's initial capital needs. Accordingly, the Risk Capital test does not and cannot apply to allow the conclusion that the present franchise is a security within the meaning of the Federal Securities Act.

"The Glenn Turner Test"

In *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476 (9th Cir., 1973) the Court adopted a further variation on the *Howey* test by determining that a franchise will be deemed a security if the efforts made by those other than the investor are:

... the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. *Id.* at 482.

Judge Lasker in *Weiboldt, supra* defined this test as the absence of:

... meaningful control [by the franchisee] in his own enterprise . . . *Weiboldt* at p. 260.

As noted above plaintiffs' complaint states that plaintiff Voight "ran, operated and managed" his General Motor's franchise; that *he* generated profits; and that *he* was recognized "... for *his* achievements" both by the franchisor General Motors and others.

In addition, plaintiff parades his past experience prior to the Dick Voight venture.

4. . . Plaintiff had been employed in various aspects of the automobile retail business . . . and had been recognized by the General Motors Corporation and others for his outstanding performance in selling . . . as well as in *operating, running and managing* an automobile dealership. (emphasis added) (a. 2)

17. . . Plaintiff . . . had become thoroughly familiar with all aspects of operating, running and managing a

new car dealership, and had proven his success in doing so on more than one occasion.

18. . . Plaintiff assumed responsibility for the operation and management of . . . a loss dealership, and Plaintiff was responsible for making the dealership a profitable operation. (a. 7)

Considering plaintiff's allegations of his past experience in managing dealerships, that he personally turned around a loss dealership and that he personally made Dick Voight Buick, Inc. a profitable success; it is clear that plaintiff had "... meaningful control in his own enterprise" (*Weiboldt, supra* at p. 260) regardless of how much assistance General Motors gave to him. In short, plaintiff himself pleads that the "essential managerial efforts which affect[ed] the . . . success of the enterprise" were his own. *Glenn Turner* at p. 482.

Accordingly, under the Glenn Turner Test the plaintiff has not, and in light of existing allegations cannot maintain that the subject franchise was a security within the Federal Securities Acts.

Plaintiff apparently agrees that the Glenn Turner test may be applicable but reaches a different result (Plaintiffs' Brief at p. 24).

Plaintiff attempts to make this argument by denigrating in his Brief the same efforts, activities, and performance by Richard Voight which were touted by the Complaint.

While the Plaintiffs Complaint states emphatically:

5. . . Richard Voight ran, operated and managed Dick Voight Buick, Inc. (A.2-3)

the Plaintiffs' Brief now states:

Plaintiff RICHARD VOIGHT was restrained from exercising essential managerial efforts with regard to

DICK VOIGHT BUICK, INC. (Plaintiffs' Brief P. 25)²²

While the Plaintiffs' Complaint emphatically states:

P. 5 Richard Voight . . . successfully generated profits and was recognized . . . for his achievements and success;

the Plaintiffs' Brief now states:

As in *Weiboldt* and *Venture*²³ . . . Defendants General Motors controlled those managerial decisions essential to producing profits from the Plaintiff's business investments . . . (Plaintiffs' Brief at 25-26)

While the Complaint states:

69. . . . Plaintiffs had invested substantial . . . time, skill, labor and expertise in building a trade name, goodwill and a business reputation.;

Plaintiff's Brief (P.P. 25-26) now relegates these efforts to those which are either "[non]managerial decisions . ." or ". . . managerial decisions [not] essential to producing a profit. . ."²⁴

Undaunted, the Brief further attempts to convince the court that plaintiffs' activities were only "nominal" by introducing

²²Plaintiffs' Complaint of course contains no such allegation and neither the Brief nor the Complaint state or give any clue as to whom Plaintiff was restrained by.

²³While the Brief states "as in *Weiboldt* and *Venture*", an examination of the *Weiboldt* case demonstrates that the Defendant General Motors was in no way involved and that the franchisor in that case did *not* control the essential management decisions. An examination of *Venture Investment Company, Inc. v. Schaefer*, 3 Blue Sky L. Rep. ¶71,031 (DC Colorado 1972), Plaintiffs' only other case, shows that (1) it was not decided under Federal law, and (2) it was decided under the "risk capital test" (see discussion above at P. 30) which is patently inapplicable in the instant case.

²⁴While the Brief now conveniently downgrades these functions, the Complaint nevertheless persists in demanding compensatory damages of \$25,000,000.00 as their value.

more new facts which are not contained in the Complaint — “the General Motors Defendants and the Marine Midland Defendants determined the capital structure . . . business hours . . . working schedule . . . number of employees and their qualifications . . .” (Plaintiffs’ Brief at 26). While these “facts” are not alleged in the Complaint, even if they were, they do not serve to buttress plaintiffs’ argument.

In *Bitter et al v. Hoby’s International, Inc.*, 498 F.2d, 183 (9th Cir. 1974), the Ninth Circuit was faced with appellants who contended like the instant plaintiff that their day-to-day management operations were rendered “nominal” because the franchisor retained control of:

. . . strict standards for operation, including standards for materials, merchandise, supplies, financial reporting, advertising, and employee services, demeanor in appearance, as well as controls over hours of operation, advertisements, the painting of the building . . . *Id.* at 184.

In response, the Ninth Circuit, author of the Glen Turner Test, held:

The contractual restrictions on the discretion of the franchise were designed merely to effectuate the purported benefits of standardization derived from participation in a restaurant chain. They did not render the franchisee’s efforts nominal. *In spite of regulation, each franchisee’s active management was essential to the success of his retail restaurant.* See *Lino v. City Investing Co.*, 487 F.2d 689 (3rd Cir. 1973); *Nash & Associates, Inc. v. Lum’s of Ohio, Inc.*, 484 F.2d 392 (6th Cir. 1973); *Wieboldt v. Metz*, 355 F. Supp. 255 (S.D.N.Y. 1973); *Mr. Steak, Inc. v. River City Steak, Inc.*, 324 F. Supp. 640 (D. Colo. 1970), *aff’d*, 460 F.2d 666 (10th Cir. 1972). *Id.* at 185. (emphasis added)

In any event, it is sufficient to note that the defendants’ motion must be decided on the basis of the allegations in plaintiff’s Complaint, and not on the statements of convenience which he subsequently adopted in his Memorandum.

Under the Glenn Turner Test the GM Franchise is not a security if plaintiff Richard Voight participated in:

. . . those essential managerial efforts which affect the failure or success of the enterprise. *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir., 1973).

The Complaint states emphatically:

5. . . . Plaintiff Richard Voight ran, operated, and managed Dick Voight Buick, Inc. [and] successfully generated profits.

In short plaintiff himself pleads that the "essential managerial efforts which [in fact] effected . . . the success of the enterprise . . ." were his own. *Glenn Turner* at p. 482.

On the basis of the facts alleged, the GM Franchise is not a security. In the light of the existing verified allegations, there is no way that plaintiff can now amend his Complaint to change this conclusion.

Plaintiff Voight has concluded his Brief on this question by directing the Court's attention to the broad protection of the Federal Securities Laws for investors. This argument ignores the recent series of Supreme Court cases which have pointedly limited that protection to those situations clearly and generally understood to involve the application of those laws. See *Ernst & Ernst v. Hockfelder*, 425 US 185, 96 S. Ct. 1375, 47 L. Ed 2d 668 (1976); *Blue Chip Stores v. Manor Drug Stores*, supra; *Piper v. Chris-Craft Industries, Inc.*, 45 USLW 4182 (1977); and *Santa Fe Industries, Inc. v. Green, et al*, — USLW — (1977).

This is not a case involving an individual inexperienced in business who has been conned into putting up money in a "get-rich-quick scheme" or "pyramid promotion" in which he has no meaningful control of the business results. See *Glenn Turner*, supra, and compare *River City Steak*, supra. Plaintiff has pleaded at length his experience ". . . in operating, running and

managing an automobile dealership" (A. 2), not to mention his "... thorough(ly) familiar[ity] with all aspects of operating and managing a new car dealership . . ." and "... his success in doing so on more than one occasion." (A. 7). The Complaint also negates any possible inference that the subject venture was in any sense speculative. The franchise which is pleaded is the right to sell some of the most respected products of the largest corporation in America. Nevertheless, this Plaintiff, posturing as an aggrieved passive investor, wishes to have a court hold that he is entitled to the protection of the Securities Laws. No court has ever held such a franchise to be a security under such circumstances, nor should one.

Further, the Plaintiff's broad appeal to the application of the Securities Laws not only ignores the failure of the Complaint to state facts on which the existence of a "security" could be found, it also, and more importantly, disregards the fact that the Complaint states facts which *negate* the existence of a security.²⁵ While the mere absence of facts might theoretically be remedied, the many verified allegations of Plaintiff's active participation in the dealership are not subject to change.

In summary as to all the plaintiffs' Securities Act claims, the statement of this Court in *Ryan v. J. Walter Thompson Co.*, 453 F2d 444-445 (2d Cir. 1971) seems particularly appropriate:

This case is another example of a trend we have observed with disturbing frequency, namely, invocation of the salutary antifraud provisions of the federal securities laws in cases where those provisions are wholly inappropriate and wide of the Congressional mark.

²⁵Plaintiff also complains that these issues are not susceptible of determination on motion to dismiss. Again, he ignores the Complaint's negation of a security and the fact that the Supreme Court's decision in *United Housing*, *supra*, was made on a motion to dismiss.

POINT IV

The allegations of Count XV that the defendants "conspired to violate . . . Federal laws enumerated herein, as well as other laws," do not state any independent Federal claim, and Count XV was properly dismissed.

In the same fashion in which the rest of the Complaint is drawn, the central paragraph of Count XV states as follows:

107. That defendants named herein and their agents, officers, employees and representatives conspired together and with others not named herein and maliciously entered into a scheme and conspiracy to defraud and deceive plaintiffs, to interfere with plaintiffs' business and personal affairs, plaintiffs' business and personal rights, to deprive plaintiffs of their investments, their profits, future profits, business expectancies, and said defendants further conspired to violate state and federal laws enumerated herein, as well as other laws, including the common law of the State of New York.

Clearly, nothing factual is added by this paragraph and no new Federal claim is alleged by the cryptic reference to "other laws." Since as has been demonstrated above, the Complaint fails to state even a solitary Federal claim against the Marine Defendants, Count XV *a fortiori* was properly dismissed.

In their Brief on Appeal, Plaintiffs for the first time argue that what they meant by Paragraph 107 was that the Marine Defendants conspired with General Motors to "facilitate General Motors' violation" of the Federal Automobile Dealers Day-In-Court Act (the "ADDCA").²⁶ (Plaintiffs' Brief, P. 32).

²⁶15 U.S.C. §1221, et. seq. Section 1222 of that Act States:

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in con-

Footnote continued on next page

All the allegations of Plaintiffs' Complaint apparently dealing with ADDCA are contained in Count IX. The introductory paragraph of Count IX states as follows (A. 32):

73. That plaintiffs repeat, reallege and reiterate Paragraphs "1-10", "14" and "15", "16-31", "51-60", "61-64" herein and make these allegations against defendants *GENERAL MOTORS* only. (Emphasis added)

The Plaintiffs' Brief contains no explanation for the language of limitation in Count IX if indeed the Count was intended to apply to the Marine Defendants.

What is more, Plaintiffs cannot point to allegations of the Complaint which buttress their conspiracy claim.

In any event, the Plaintiffs have not cited any authority to support their conspiracy theory. Indeed, the authorities are to the contrary. It has decisively been held that:

An action under the ADDCA must be predicated on a written franchise agreement. An entity which is not a party to such an agreement, even if the entity is otherwise considered an "automobile manufacturer", is not within the Court's jurisdiction as established in §1222. *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824, 831 (N.D. GA. 1976), citing also: *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 63 (9th Cir. 1973); *Reliable*

Footnote continued from preceding page

troversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer: provided, that in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith (emphasis supplied)

Volkswagen v. World Wide Auto, 216 F. Supp. 141 (D.N.J. 1963); *Lawrence Chrysler Plymouth v. Chrysler Corp.*, 461 F2d 608, 613 (7th Cir. 1972); *York Chrysler Plymouth Inc. v. Chrysler Credit Corp.*, 447 F2d 786, 791 (5th Cir. 1971).

No claim is made in this case, nor can it be that the Marine Defendants were parties to an automobile franchise with the Plaintiffs.

It follows that no independent claim was stated in Count IX and that it was correctly dismissed by the District Court.

POINT V

The District Court properly dismissed the Plaintiffs' Complaint; Plaintiffs made no request of the Court to amend their Complaint prior or subsequent to Dismissal; the inclusion of the words "with prejudice" did not prevent Plaintiffs from moving to Amend; Plaintiffs' failure to seek leave to Amend should preclude consideration of their present request.

In the face of the Defendants' Motion to Dismiss, which squarely challenged the factual and legal basis for the Plaintiffs' claim, the Plaintiffs failed to provide the District Court with any cognizable basis to sustain their Complaint (See Plaintiffs' Memorandum in the District Court made an Exhibit to this Brief and Plaintiffs' Reply Affidavit (A. 83-87)). At no time in the District Court did they seek leave to amend, or in any fashion indicate that they were in possession of facts or a legal theory which would have allowed them to state any Federal claim.

It hardly lies with the Plaintiffs to now question whether the District Court should have given them leave to amend when the issue was never raised.

Plaintiffs argue in their Brief (P. 35) that the District Court should have "merely ruled that Plaintiffs' Complaint failed to state a claim" rather than dismissing the Complaint with prejudice. They claim that the District Court precluded them from applying for leave to appeal by the use of the words "with prejudice".

It is clear, however, that a dismissal for failure to state a claim even without the addition of the words "with prejudice" would nonetheless have been deemed ordered with prejudice. Under Federal Rule 41(b),²⁷ unless a court states otherwise, any dismissal is deemed an adjudication on the merits, that is to say, "with prejudice". *Hall v. Tower Land & Investment Co.*, 512 F2d 481 (5th Cir. 1975).

It is also clear that despite dismissal on the merits, Plaintiffs were in no way precluded from using the long-accepted procedure of a Motion to Vacate the Judgment of Dismissal under Rule 59(e) or Rule 60(b), coupled with a Motion for leave to amend. *Foman v. Davis*, 371 US 178 S. Ct., 9 L. Ed2d 222 (1962); *Feddersen Motors v. Ward*, 180 F2d 519 (10th Cir. 1950).

Of course, prior to the Judgment of Dismissal, Plaintiffs' also had ample opportunity to amend. Rule 15(a) provides that: "A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . ."²⁸ Thus,

²⁷Rule 41(b) provides in pertinent part as follows:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this Subdivision and *any dismissal not provided for in this Rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. (Emphasis added)

²⁸However, once a Judgment granting a Motion to Dismiss the Complaint has been granted, the majority and the Second Circuit view is that the plaintiff may no longer amend his Complaint as of right. He may only do so with leave of the Court. *Swan v. Board of Higher Education of the City of New York*, 319 F2d 56 (2d Cir. 1963).

Plaintiffs could have amended as of right anytime between the date their Complaint was filed in April 1976 and December 14, 1976, the day that the Complaint was dismissed.

Clearly, during the pendency of the Motion to Dismiss, Plaintiffs could have sought, as an alternative to the denial of the Marine Defendants' Motion to Dismiss, leave to file an amended Complaint. As stated before, no such relief was sought or even hinted at in any of the Plaintiffs' papers below.

There appears to be no requirement that the District Court grant leave to amend the Complaint, when leave has never been requested. On the other hand, it has been held that:

Failure of the appellants to bring to the attention of the court considerations requiring an exercise of discretion estops them from asserting that privilege after decision on the merits. *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965).

In order for the District Court to properly exercise its discretion in deciding whether a leave to amend should be granted, even when a request is made, the best procedure would be to provide the Court with a proposed amended Complaint [*Lilly v. United States Lines Co.*, 42 F. Supp. 214 (S.D.N.Y. 1941)] or at least sufficient additional facts, which if added to the Complaint could withstand the Motion to Dismiss [*Washburn v. Madison Square Garden Corp.*, 340 F. Supp. 504 (S.D.N.Y. 1971)].

In short, there is simply no substance to the Plaintiffs' Complaint that "they have never had an opportunity to move for leave to amend their Complaint". (Plaintiffs' Brief, P. 34) Further, their failure to seek leave and their failure to demonstrate any basis below or in this Court for the case to proceed against the Marine Defendants would seem to bring the matter within the holding of *Feddersen Motors v. Ward*, 180 F.2d 519, 523 (10th Cir. 1950):

It is suggested in the Brief of Fedderson that in the event it be held that the complaint failed to state a cause of action under the Act, the essential elements which were not pleaded will be supplied if leave is granted to amend. The right granted by Federal Rule of Civil Procedure 15(a) . . . to amend the complaint once as a matter of course ended with the entry of the judgment dismissing the action. Thereafter, the pleading could be amended only with leave of the court. Application, addressed to the sound judicial discretion of the court, might have been made under Rule of Civil Procedure 60(b) to have the judgment set aside in order to permit the filing of an amended complaint. *Kean Lumber Co. v. Leventhal*, 1 Cir., 165 F2d 815. But the record before us fails to indicate that any application of that kind was made and therefore, no question relating to the filing of an amended complaint is open to consideration on appeal.

CONCLUSION

Based upon all of the above, the conclusion is required that the Complaint fails to state any Federal claim upon which any relief can be granted. It is so devoid of factual allegations relative to the elements of statutory violation, as to give neither the Court nor the Defendants any notion as to what the case is all about.

To say "I am suing you for having violated the Sherman Act, the Clayton Act, the Securities Act and other Federal laws, and for conspiring to violate these laws" does not serve the function of "notice pleading".

Moreover, one is left with the clear impression that the Marine Defendants were only named in the case for "good measure".

The Plaintiffs have had sufficient opportunity to demonstrate that their case against the Marine Defendants has substance and a future, without result.

For all of these reasons and those previously stated, the Order of the District Court should be affirmed and costs granted to the Appellees.

Respectfully submitted,

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

April 11, 1977

Re: Richard Voight & Dick Voight Buick Inc. vs. General Motors Corporation, et. al.

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Kenneth Payment, Esq.
Harter, Secrest & Emery
Attorney(s) for
Defendants-Appellees
On April 11, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to: XX

EXHIBITS TO THE BRIEF

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April 1977

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Commissioner of Deeds